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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 611

MALLONEE, BUCKLIN AND FERGUS, ETC., ET AL.,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL.

BRIEF AMICUS CURIAE ON BEHALF OF DISTRICT COURT JUDGE PEIRSON M. HALL

I. Introduction

In this case the Court of Appeals for the Ninth Circuit has issued an extraordinary writ of mandamus against a United States District Judge, Peirson M. Hall. This decision is based upon a finding that Judge Hall did not carry out two disputed provisions of a Mandate of the Appellate Court in the exact manner intended by that Court.

One of the two disputed provisions of the Mandate ordered dismissal of five specific pleadings (out of many pleadings filed) in a specified action. The Court of Appeals now says it intended dismissal of the entire action. The record of the Court of Appeals when it issued the Mandate

contained many other pleadings in the action, but the Mandate was silent as to all except the five specified.

The other action of the District Court with which the Court of Appeals now disagrees is an order retaining Court custody of certain notes and collateral. The Court of Appeals' Mandate ordered their return to Respondents. The District Court's retention order was made because of changed conditions to protect the parties in a new judicial foreclosure action, brought by Respondents, involving the same notes and collateral.

The Court of Appeals ordered Judge Hall to decide the merits of Respondents' *Foreclosure Action.* That action is separate and apart from, and not referred to in, the Mandate. As stated, Respondents in that Action seek foreclosure upon the very notes and collateral which the Mandate ordered returned to Respondents. The notes in question permit *secret* foreclosure by Respondents. If Respondents secured possession of the notes and secretly foreclosed, the Respondents' foreclosure action would be rendered moot. Faced with conflicting orders from the Court of Appeals, and having been ordered by the Court of Appeals to try the *Foreclosure Action,* Judge Hall had to guard against secret foreclosure by Respondents. Respondents refused to agree that they would not secretly foreclose if given possession of the notes and collateral. In the light of Respondents' refusal, Judge Hall then did the only thing he could equitably do. He ordered the notes and collateral returned to Respondents by transferring them to Respondents' own *Foreclosure Action* to await its outcome. This constitutes compliance with both orders of the Court of Appeals in the two separate cases then pending before Judge Hall.

The retention order protects 8,000 home owners and 30,000 depositors against secret foreclosure by Respondents. It was made only after Petitioners herein did "equity" by offering a cashier's check for $7,000,000—the full amount

of Respondents' claim—to indemnify Respondents against any possible losses in their pending suit.

Throughout this litigation, and throughout his judicial career, the District Judge against whom these extraordinary writs were issued has stressed that he is bound by the law and by the Mandates of this Court and the Court of Appeals. Because of great differences of opinion among the parties over the proper construction of the Mandate herein the District Court Judge repeatedly requested the parties to apply to the Court of Appeals for an interpretation thereof. The parties failed to respond to that request, thereby placing the burden upon the Judge of interpreting what the Court of Appeals intended. The District Judge then, after extensive hearings, briefs and argument of Counsel for the parties, ruled on the disputed points and explained the reasons for his rulings and interpretations in three carefully prepared opinions.[1]

The Court of Appeals now disagrees in two instances with the orders of the District Court Judge. That Court herein has not only disagreed with and reversed those orders, it has used its extraordinary writ power to grant sweeping and drastic relief to Respondents of far reaching and unprecedented consequences.

Because his actions have been called in question by making him a personal litigant, and because he has spent more time on this litigation than any other Judge during the past ten years, Judge Hall feels called upon to present to this Court a short outline of the history of this litigation and a short outline of his work since the disputed Mandate was issued. He does not quarrel with the power of the

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[1] *Mallonee* v. *Fahey*, 117 F. Supp. 259; *Federal Home Loan Bank Board* v. *Long Beach Fed. S. & L. Assn.*, 122 F. Supp. 401; *Mallonee* v. *Fahey*, 122 F. Supp. 472.

These opinions cover over 200 pages and recite in detail most of the facts summarized in this Statement.

Court of Appeals to issue extraordinary writs in proper cases. He does feel called upon to have this Brief filed in order to set forth an independent review of the basic facts of this complicated litigation since neither Petitioners or Respondents have done so. He believes this review will aid the Court in its consideration of the Petition for Certiorari herein. He has requested Counsel of his own choosing to review the record herein and to prepare and present this Brief to the Court.

Counsel, who were requested by Judge Hall to prepare and file this brief, have not previously been connected with this litigation in any way.

II. Statement

While this brief *amicus curiae* is being filed with the full authority of, and at the request of, Judge Hall, the statements contained herein are the analysis and statements of Counsel and not those of Judge Hall personally.

This is a case of first impression and far-reaching consequences to the administration of justice. No precedent for the unique action of the Court of Appeals herein exists. If this decision stands, the extraordinary writs of mandamus and injunction will have become substitutes for the appellate processes prescribed by statute for the orderly administration of justice. In this case no facts exist justifying such substitution. And worst of all, a conscientious hard working District Judge will have been mandamused, and in effect criticized, for doing what appears to these Counsel to be the very type of judicial work to which all claimants are entitled.

An outline of the history of this litigation is believed to be essential to a clear understanding of the issues herein. Anything beyond a mere outline would be extremely lengthy and perhaps unhelpful due to the narrow issues presented by Petitioners of: (1) whether new Federal statutory provisions on the exact subject apply to pending undecided lit-

igation; (2) whether original writs of mandamus and injunction were properly granted under the facts of this case as a substitute for untried actions and unheard appeals; and (3) whether decisions ordering pleadings dismissed for lack of jurisdiction (for failure to exhaust administrative remedies) are "res judicata" as to the merits of causes of action therein when said merits are presented in different form and substance under a claim of Federal jurisdiction on new grounds. Or stated differently, must the factual and legal basis of the new jurisdictional grounds be examined to test their substance or is it proper to summarily reject them without Court consideration as the Court of Appeals has done herein?

Respondents state the questions differently as (1) the application of the new statutory provisions and (2) whether writs were proper "where the District Court refused to comply with the mandate" and where Petitioners harassed respondents with new actions on issues allegedly already litigated.

Counsel for Judge Hall emphatically reject and deny Respondent's charge that he refused to carry out said mandate. This Brief will collect the facts which refute Respondents' charge.

III. Outline of Facts

On May 20, 1946 the Federal Home Loan Bank Administration named A. V. Ammann as Conservator of the Long Beach Federal Savings and Loan Association (hereinafter called Long Beach Association). That same date Mr. Ammann summarily took possession of all the properties and assets of that Association.[2] The alleged grounds assigned for the seizure were that the Association was conducting its affairs in an unlawful, unauthorized and unsafe manner, that its management was unfit and unsafe, and that it

[2] Order 5254, 14 F. R. D. 273, 284, footnote 6.

was jeopardizing the interests of its members, creditors, and the public.

Since this summary seizure, numerous actions have been brought denying the grounds specified, and challenging its validity, as well as the validity of the actions of the Conservator. All of these actions have been filed in the United States District Court for the Southern District of California. An action growing out of the same subject matter was brought in a California State Court by Respondents and removed to said District Court. Two petitions for writs of mandamus and injunction have been filed by Respondents in the United States Court of Appeals for the Ninth Circuit. One petition for a writ of mandamus was filed in this Court, also by Respondents.

On May 27, 1946 one Mallonee and others, as a shareholders' committee of the Long Beach Association, filed Action 5421 in the District Court challenging the validity of the Conservator's appointment and actions, and alleging that the seizure was motivated by ill will and malice. A temporary injunction was issued. Since constitutionality of a Federal statute was drawn in question, a three-judge Federal District Court was convened. That Court held certain provisions of the Home Owners' Loan Act unconstitutional, enjoined a proposed administrative hearing, and ordered the Conservator's removal and an accounting.[3] The order was stayed the day after its issuance by an order signed by Mr. Justice Rutledge of this Court.

The Three-Judge Court Decision was appealed to this Court. A petition was also filed for a writ of mandamus to set aside an order of the District Court allowing attorneys' fees and costs to the shareholders' committee and for a writ of prohibition and injunction against any further allowance.

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[3] *Mallonee* v. *Fahey*, 68 F. Supp. 418 (D. C. Cal. 1946).

This Court reversed the judgment of the Three-Judge Court, but did not order dismissal of Action No. 5421.[4] The Petition for the extraordinary writs was denied.[5]

On August 22, 1946, Action No. 5678 was filed by the Federal Home Loan Bank of Los Angeles and some of its stockholders' associations attacking the validity of various orders[6] of the Federal Home Loan Bank Administration dissolving the Los Angeles Bank, transferring its properties and assets to the Portland Bank, and changing the name of the latter to Federal Home Loan Bank of San Francisco.

Actions 5421 and 5678 were consolidated. Thereafter, numerous orders were made by the District Court, particularly in connection with interpleaders, by persons owing notes to the Long Beach Association secured by trust deeds. These interpleaders brought approximately a million and a half dollars ($1,500,000) into Court. Numerous orders were made thereon. There were also numerous other orders, including certain orders allowing attorneys' fees and costs. From several of such orders appeals were taken by the Respondents attacking the jurisdiction of the District Court but all of such appeals were dismissed.[7] Appeals were also taken from subsequent orders allowing attorneys' fees, Masters' fees, and the like, some of which are still pending.

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[4] *Fahey* v. *Mallonee*, 332 U. S. 245. In fact, in its opinion this Court said in part: at pp. 256-257, "Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies." And at pages 257-258 this Court said: "Our decision is that it was error in the Court below to hold the section unconstitutional, to oust the conservator or to enjoin any of his proceedings or to enjoin the administrative hearing, and this without prejudice to any other administrative or judicial proceedings which may be warranted by law."

[5] *Ex parte Fahey*, 332 U. S. 258.

[6] 14 F. R. D. 273-283.

[7] See *Mallonee* v. *Fahey*, 117 F. Supp. 259.

On January 17, 1948, by Order No. 388 of the Home Loan Bank Board, the Conservator was removed, and the Long Beach Association was restored to possession of some of its property and assets.[8] The claims ordered dismissed by the Court of Appeals herein relate chiefly to what the Conservator did during his two-year tenure and what happened to this seized property and assets.

On December 1, 1949, an order[9] was made after hearing in the *Consolidated* case (5421-5678) enjoining and restraining an administrative hearing before the Home Loan Bank Board concerning the administration of the affairs of the Long Beach Association.[10] Neither the Order of the Home Loan Bank Board for the hearing, nor the injunction of December 1, 1949, were concerned directly with the subject matter of the Los Angeles Bank, Action No. 5678.

The Respondents appealed from the December 1, 1949, Order for Injunction. On April 2, 1952, the United States Court of Appeals rendered its decision reversing the order granting the injunction.[11]

Subsequently, petitions for certiorari were filed in this Court and denied.[12]

On June 19, 1950, after notice and hearing, Judge Hall issued an Order for allowance of attorneys' fees, limited to Counsel for plaintiffs in the Los Angeles Bank Action No. 5678. Respondents appealed.

On November 6, 1952 the United States Court of Appeals filed its opinion in the attorneys' fees appeal,[13] the concluding paragraph of which reads as follows:

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[8] On January 23, 1948 the District Court entered an order removing Ammann as Conservator, requiring him to account, and revesting title to all of its property and assets in the Long Beach Association. No appeal was taken from that order.

[9] 14 F. R. D. 273.

[10] Order No. 2015 (Sept. 9, 1949), 14 F. R. D. 273-283, footnote 11.

[11] *Home Loan Bank Board* v. *Mallonee*, 196 F. 2d 336.

[12] *Mallonee* v. *Fahey*, 345 U. S. 952; Reh. Den. 345 U. S. 978.

[13] *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420.

"For reasons set forth in this opinion the order of the lower court here on appeal which awards attorney's fees to appellees is reversed. The validity of the claim for such fees is sustainable only on the theory that the lower court had *jurisdiction in personam over indispensable parties* to the Los Angeles Action and jurisdiction of the subject matter of that action. We have previously held that the court did not have *such jurisdiction* and we therefore remand the case before us with directions to the lower court to dismiss the Los Angeles Action." (p. 481) (Italics supplied).

Applications for certiorari were made to this Court and denied.[14]

On May 25, 1953 a consolidated mandate of the Court of Appeals in the injunction and fee cases, *supra*, dated May 21, 1953, was presented to the District Court. No action was taken pending final disposition of the then pending petitions for rehearing of orders denying the certiorari petitions by this Court. Said petitions were denied June 8, 1953[15] and some days later this action was called to the attention of Judge Hall.

The matter of action upon the mandate came on for hearing before Judge Hall on June 22 and 24, 1953. Judge Hall advised the parties that he was then involved in the trial of a complicated water rights case at Fresno, California, which case required his presence in Fresno every day of the week except Mondays. He also advised Counsel that he must preside over the criminal calendar of the Court during July, August, and September—a full-time judicial duty in his Court. Judge Hall pointed out to Counsel that the mandate went much further than the two orders appealed from, i.e. the order of injunction and the order for attorneys' fees, in that it ordered:

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[14] *Mallonee* v. *Fahey*, 345 U. S. 952; Reh. Den. 345 U. S. 978.
[15] 345 U. S. 978.

1. Dismissal of Action 5678 at the cost of Plaintiffs.

2. Dismissal of specified pleadings—but not the entire action in Action 5421.

3. Return to the San Francisco Bank of certain promissory notes and collateral security.

4. Vacating the order of preliminary injunction.

He requested Counsel for Respondents herein, as Counsel for the prevailing parties, to prepare and submit whatever judgments and orders in their opinion were required to be made to carry out this Mandate.

One form of judgment and thirteen proposed orders were then submitted by the Respondents herein.

IV. Comparison of Mandate's Provisions and Judge Hall's Orders of Compliance

Provisions of Mandate	Compliance with Mandate
"1. Dismiss Civil Action No. 5678-P.H. at the cost of plaintiffs."	1. By Opinion filed November 30, 1953, (117 F. Supp. 259, pp. 272-273) the District Court stated that upon determination of the propriety, amount, and allocation of costs in accordance with the mandate an order would be made severing Action 5678 from Action 5421 and Action 5678 would be dismissed. Hearings on this phase of the matter were held in January 1954 and on July 23, 1954 judgment of dismissal with costs was rendered.

Provisions of Mandate	Compliance with Mandate
"2. Dismiss the following pleadings in Civil Action 5421-P.H.:	2. On December 11, 1953, in accordance with an Opinion deciding disputed points (117 F. Supp. 259, 275-276) an order was made providing in part as follows:
(a) The complaint of Mallonee, Bucklin and Fergus, and all amendments and supplements thereto, at the cost of said complainants;	"Now, therefore, in compliance with the terms of paragraph 2(a), (b), (c), (d) and (e) of said mandate,
(b) The cross-claim and third party complaint of Long Beach Federal Savings and Loan Association, and all amendments and supplements thereto, at the cost of third party complainant and cross-claimant;	"It is hereby ordered that the following pleadings in civil action No. 5421-PH be, and the same are, hereby dismissed:
(c) The cross-claim of Federal Home Loan Bank of Los Angeles, and all amendments and supplements thereto at the cost of said cross-claimant;	"The Complaint of Mallonee, Bucklin and Fergus, and all amendments and supplements thereto, at the cost of said complainants;
(d) The cross-claim in interpleader of Title Service Company, and all amendments and supplements thereto, at the cost of said cross-claimant;	"The cross-claim and third party complaint of Long Beach Federal Savings and Loan Association, and all amendments and supplements thereto at the cost of third party complainant and cross-claimant;
(e) The cross-claim in interpleader, and all amendments and supplements thereto, of Robert H. Wallis,	"The cross-claim of Federal Home Loan Bank

Provisions of Mandate	Compliance with Mandate
at the cost of said cross-claimant."	of Los Angeles, and all amendments and supplements thereto at the cost of said cross-claimant; "The cross-claim in interpleader of Title Service Company, and all amendments and supplements thereto, at the cost of said cross-claimant; "The cross-claim in interpleader, and all amendments and supplements thereto, of Robert H. Wallis, at the cost of said cross-claimant;"
"3. Dissolve, set aside and vacate the order of said District Court entered the 13th day of March, 1948, insofar as the same requires Federal Home Loan Bank of San Francisco to deposit in the Registry of said District Court promissory notes in the aggregate principal amount of $6,300,000.00, collateral securing the same and any other documents or property deposited by San Francisco Bank pursuant to said order; and return to Federal Home Loan Bank	3. On September 16, 1954 the District Court ordered: "That the said U. S. Government bonds in the face sum of $5,300,000 and their attached coupons, described in detail in the Order of December 11th, 1953, together with the sum of $994,865.01, plus 14 cents per day since August 3, 1953, and the conservator's notes in the face sum of $6,300,000, all now on deposit in the registry of this Court in Action No. 5421, be returned to the Federal Home Loan Bank of San

Provisions of Mandate	Compliance with Mandate
of San Francisco without charge or impairment said promissory notes, together with Government bonds in the face amount of $5,300,000.00 with all interest coupons attached thereto at the time of deposit and together with cash from the sum in the Registry of said Court sufficient to make the combined total sum of $6,324,098.35, with interest on $6,300,000.00 at 2% per annum from the 10th day of March, 1948 until the date of such release."	Francisco by transferring the same in the Registry of this Court to the within Action No. 13979, to the credit of said Federal Home Loan Bank of San Francisco and/or Long Beach Federal Savings and Loan Association, whichever shall be held entitled thereto by final judgment in the within action, which the Clerk is ordered forthwith to do. "It is further ordered, that upon compliance with the foregoing paragraph, the Long Beach Federal Savings and Loan Association, and in lieu and instead of said U. S. Government bonds of $5,300,000 and their attached coupons and said cash in the sum of $994,865.01, plus 14 cents per day since August 3, 1953, shall deposit in Court in this action U. S. Government, 2½% September 15, 1972-67 U. S. Government bonds in the face of $7,005,000 and their attached interest coupons, which shall be retained by the Clerk in the registry of the Court

Provisions of Mandate	Compliance with Mandate
	pending final adjudication of the within action, as collateral security only on said conservator's notes in the face amount of $6,300,000, subject to all claims and liens, rights if any, of the parties to the within action. and that upon such deposit of $7,005,000 of U. S. Government bonds and their attached coupons the Clerk shall forthwith deliver to Long Beach Federal Savings and Loan Association the said U. S. Government bonds in the sum of $5,300,000 with their said attached interest coupons and the sum of $994,865.01 plus 14 cents per day since August 3, 1953. "While no stay has been ordered in the pending writ proceedings in the Court of Appeals, nevertheless out of deference to such Court, and possible Supreme Court rulings thereon, or in connection therewith, execution of the within order is stayed until further order of the Court."
"4. Set aside and vacate	4. This Order was entered

Provisions of Mandate	Compliance with Mandate
said order of preliminary injunction entered the 2nd day of December, 1949."	by the District Court September 21, 1953.

We quote the text of the orders complying with parts 2 and 3 of the Mandate as they are the only orders which are disputed herein.

It is beyond dispute that when the Court of Appeals by paragraph 1 of its Mandate ordered Judge Hall to "Dismiss Civil Action No. 5678" and then by Part 2 thereof only ordered him to "dismiss the following pleadings [of the many in the printed record before it] in Civil Action No. 5421—P.H.:" that something different was intended in the handling of the two actions. Yet, the Court of Appeals now says its intent was the same as to both actions, i. e., complete dismissal. Surely the meaning of the plain words refutes such an intent. And even if this was the undisclosed intention of the Court of Appeals, that is no justification for the issuance of an extraordinary writ against the District Judge.

Judge Hall was of the view that the plain language of the mandate directing the Court, in paragraph 1, "to dismiss Civil Action 5678," and in paragraph 2 to "dismiss the following pleadings in Civil Action 5421," plainly indicated that Civil Action 5421 should not be dismissed but that only the specified pleadings should be dismissed.

In addition to this difference in language, Judge Hall was aware of the fact that the Court of Appeals knew that over 50 orders had been made in Action 5421 which had become final, the effect of which was to quiet title to real property of more than 480 separate parcels of land of homeowners who had borrowed money from Long Beach Association and secured the repayment thereof with deeds

of trust constituting clouds upon the title to said property.[17] In the Brief of Respondents herein (appellants therein) in Case No. 12511 in the Court of Appeals, at page 85, it was stated "It may be assumed that those orders insofar as they directed the issuance of reconveyances to the borrower-intervenors, were final."

Attention of the Court is also called to the excerpts from the Briefs of the Respondents in Cases No. 656 and 659 (Oct. term, 1953) referred to on page 30 of the Petition herein. There it is pointed out that Respondents expressly **conceded the reason for the difference between dismissing** Action 5678 completely and dismissing only certain pleadings in Action 5421.

The Court of Appeals now says that it intended that the entire Action 5421 should be dismissed. The District Court followed the language of the Mandate exactly. If he was wrong in so doing, the remedy was by appeal and not by mandamus.

The action of Judge Hall with respect to Part 3 of the Mandate is best summarized in his own opinion as follows:

> ". . . it would be repugnant to all ideas of justice and law, that the appellate court intended by mandate in one case, (5421-5678), to summarily decide the merits of another case, (13979), not before them on appeal, and no phase of which had been decided by the trial court so as to posture it for appeal, and thus to preclude any defense by Long Beach Association to action 13979. It is also repugnant to the express terms of the order of that court, which vacated the then existing injunction, and expressly permitted the San Francisco Bank to prosecute, and the Long Beach Association to appear in, answer, defend and participate in action 13979, 117 F. Supp. 259, at page 291." [18]

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[17] See discussion of Judge Hall, 117 F. Supp. 259 at 273-276.
[18] 122 F. Supp. 401; 444, 445.

Since neither party herein has made it crystal clear just how Respondent's Foreclosure Action 13979 fits into the complicated picture of this litigation some further explanation of that foreclosure case is required.

On March 25, 1952 the Court of Appeals entered an order authorizing Respondents to bring suit in a California State Court to foreclose upon the notes and collateral which by paragraph 3 of its disputed Mandate it one year later ordered returned to Respondents by the District Court. The order of March 25, 1952, further allowed Petitioners herein to appear in, answer, defend and participate in that action.

That case was then removed to Federal District Court, given the number of 13,979, and assigned to Judge Hall. On November 13, 1952 the Court of Appeals entered another order expressly providing "Said District Court is hereby permitted to entertain and determine the cause designated as No. 13,979 filed in said District Court."

On December 11, 1953 Judge Hall, pursuant to paragraph 3 of the Mandate, ordered the return of the collateral previously ordered deposited by the District Court in the registry of the District Court. That collateral included the identical collateral—which is the subject of the judicial foreclosure sought by Respondents in the *Foreclosure* Action No. 13979. This order required the San Francisco Bank to sign a receipt for the money and property, acknowledging that it was received and held by the Bank as collateral security only. The Bank refused to sign such a receipt. It is clear that the only claim of San Francisco Bank to the collateral was as collateral security. This is recognized by Mr. Justice Douglas in his Opinion herein, on October 31, 1955, denying a stay of the order granting mandamus in this case.

Before the date fixed for the return of the collateral, the Long Beach Association petitioned for and was granted

a stay of the order pending hearing on a motion made in the *Foreclosure* Action for the re-deposit of the collateral in that action. On September 16, 1954 the Court vacated the stay order.

The District Court was faced with two problems: (1) compliance with the provisions of paragraph 3 of the Mandate to return the notes and collateral to Respondents; (2) a motion made in the *Foreclosure Action* to retain the collateral in that case pending the outcome [18a] of that litigation. The District Court believed that the changed conditions and equitable considerations required it to order the collateral returned in Action 5421 as required by the Mandate and then held in the *Foreclosure Action* to await its outcome. The order to that effect was appealed from and was pending before the Court of Appeals, and jurisdiction over it presumably transferred to that Court while the mandamus petition was before it for action. The effect of the writ of mandamus is to compel the District Court to, in effect, vacate an order which had been appealed from and over which it has no jurisdiction.

A final summary judgment quieting title on some 4000 parcels of land was entered on September 16, 1954 [18b] in Respondents' *Foreclosure* Action and an appeal was taken from that Judgment.

Attention of the Court is called to the statements of the Court of Appeals in its Opinion (pp. 43-44) with respect to the *Foreclosure Action's* summary judgments, including all of the money on deposit in the Registry of the Court. It is stated that such summary Judgments "would contravene

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[18a] On power of District Court to transfer money from one action to another see e.g. *United States* v. *Morgan*, 307 U.S. 183, 197; *Clarke* v. *Chicago, B. & Q. R. Co.*, 91 F.2d 561, (C.A. 10, 1937); *Lord* v. *Superior Court*, 27 Cal.2d 855, 858; 168 P.2d 14, 16 (1946).

[18b] 122 F.Supp. 960. Respondents sought foreclosure of all liens on all property involved in notes and deeds of trust assigned to the San Francisco bank and the Court quieted titles of all who had paid.

the mandate of this Court" and that the judgment proposed to be entered in 13979 "would be a flagrant transgression of the mandate." The Opinion and findings of the District Court expressly excluded from the quiet title judgment the money, notes, trust deeds and collateral on deposit in the Registry of the Court.[19] It is perfectly obvious that the Court of Appeals entirely mis-read the opinion and judgment of the District Court and was wholly unjustified in stating that the Judgment contravened or transgressed the mandate.

When Respondent sought judicial foreclosure it made an election of remedies to proceed by way of judicial foreclosure of the right of redemption by a judicial sale under the direction of a court of competent jurisdiction. Having invoked the judicial power of the Court, the *res* of the foreclosure was subject to the jurisdiction of the Court. And the Court could preserve its jurisdiction by proper orders and prevent the ousting of the Court's jurisdiction by private sale of the pledged property.

As is stressed by the Petition (pp. 4-6) herein the notes in question expressly authorize secret foreclosure. Also as pointed out in the Petition (p. 10) Respondents have at all times, until they appeared before Mr. Justice Douglas herein, declined to give any assurances against a secret foreclosure of the notes if possession of the notes and collateral was given to them.

Faced thus with conflicting directions from the Court of Appeals, i. e., (1) the Mandate ordering return of the notes and collateral to Respondents, and (2) the order to determine Respondent's *Foreclosure Action*, Judge Hall entered the order quoted above which does both. *Howard* v. *McCullum*, 76 U. S. 175.

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[19] 122 F. Supp. 401, 420-421, 428-456.

Another equitable justification for Judge Hall's order on paragraph 3 of the Mandate is the fact that petitioners tendered a sum of money ($7,000,000) large enough to cover all possible claims of Respondents. To give Respondents the opportunity of making a secret foreclosure under these circumstances is clearly inequitable. The interest of 8,000 homeowners and 30,000 depositors are entitled to consideration.

Under these circumstances of *secret foreclosure* vs. *judicial foreclosure* the order entered was the only equitable action Judge Hall could take and the only action he could take which complied with *both* Court of Appeals orders. After all, Respondents themselves sought judicial foreclosure and should not be heard to complain that they are to receive what they asked for.

V. Judge Hall Did Not "Refuse" To Carry Out The Mandate as Charged by Respondents

The Petition for the writ of mandamus, and the decision of the Court of Appeals, is based upon what Judge Hall did, or did not do, for the period of approximately one year after the Mandate of the Court of Appeals was issued. Three times in their Brief of Opposition herein Respondents make the serious charge that Judge Hall "refused" to carry out the Mandate (pp. 2-3, 7, 9). The facts do not support Respondents' charge.

Appendix A to this Brief gives a detailed account of the work of Judge Hall during the year in question. That account demonstrates that in handling 1,400 other calendared matters besides the instant complicated litigation Judge Hall did a tremendous amount of judicial work. It is obvious from the facts there recited that long before the filing of the Petition for Mandamus on June 4, 1954, either Judge Hall had issued orders on all matters covered by the Mandate or they had been the subject of hearings and were under submission for decision. Far from arbitrarily, or

unreasonably, refusing to carry out the provisions of the Mandate, Judge Hall had given all possible time and priority to the parties with respect thereto.

The list in the Appendix A includes only the recorded action of Judge Hall. It cannot give an accurate or full report of the many hours of time devoted to this unique litigation in the study of briefs, pleadings and other papers, and in preparing the three exhaustive opinions filed herein.[20] A steady stream of pleadings and briefs have been filed in this vastly complicated litigation on hundreds of subjects. This steady stream reached the flood stage after August 2, 1954 when the Housing Act of 1954 [21] became effective. This is understandable because, as the Court of Appeals itself has stated, that Act is the "basic issue" (p. 36) and the issues raised with respect to that Act are issues never before decided on their merits.

After August 2, 1954 new actions were filed by Petitioners in the District Court [22] along with proposed amendments to pending pleadings, to bring all of this litigation under the Housing Act of 1954, which confers jurisdiction on Federal District Courts over the Home Loan Bank Board in "any matter under this section, or regulations made thereunder, or any other law or regulation." [23] All of said new and proposed pleadings rely upon the fact that said 1954 Act also provides:

> "Insofar as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling." [24]

This new Act seems to cast a special duty upon Judge Hall's District Court since it rests its newly created juris-

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[20] Cited, *supra*, footnote 1.
[21] 68 Stat. 590, 12 U.S.C. 1464, et seq. (1952 Ed., Supp. II).
[22] 17,133; 17,152; 17,153; 17,154.
[23] Cited, *supra*, note 21, § 503.
[24] 12 U.S.C. (1952 Ed., Supp. II) p. 231.

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National City Lines, 337 U.S. 78, 84.

hat upon this record of conscientious, care-
consideration of the rights of all parties in
litigation there is no showing that Judge
unreasonably delayed or failed in any way
the provisions of the Mandate. The claim
nts that Judge Hall disregarded the Man-

[25] See Petition herein pp. 16-18, 23-26.

date is clearly without basis in fact. The record herein proves that he attempted to comply with it and that he did so according to his understanding of the Mandate based upon the entire record in the proceedings.

VI. Issuance of the Extraordinary Writ of Mandamus Is Not Proper in This Case

It is believed that the outline of the work of Judge Hall in Appendix A is convincing evidence in and of itself that the use of extraordinary writ of mandamus is improper under the facts of this case. Granted that such extraordinary remedies are proper where the facts warrant, it is respectfully submitted that the action of the Court of Appeals in adopting a meat-ax approach to this complicated litigation is a drastic and unprecedented remedy which merely further confuses and confounds the fantastic record herein. And as will be demonstrated at pages 27-29 herein, the Court of Appeals decision creates a flood of, rather than ends, the litigation growing out of the seizure of the Long Beach Association.

In *Ex Parte Fahey*, 332 U.S. 258, this Court in denying a petition for a writ of mandamus in this litigation said in part (pp. 259-260):

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies . . . . . they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only when appeal is a clearly inadequate remedy. We are unwilling to use them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes."

This is a case where the Court of Appeals has taken "drastic" action against Judge Hall in spite of his record

of giving an extraordinary amount of his time to this litigation, his strict compliance with the parts of the Mandate which are clear, his tremendous effort to consider what the parties presented on the disputed terms of the Mandate here in question, and his three carefully written opinions[26] which fully explain all of his actions. The two orders with which that Court disagrees could have been appealed upon a full record rather than considered upon the petition for extraordinary relief as was done herein.

There is no question but that this is an instance where appeals could have been heard just as expeditiously as the Petitions for extraordinary relief. Judge Hall would not be human if he did not want to terminate this litigation even more so than does the Court of Appeals. Obviously it plagues him constantly and takes a tremendous amount of his time. Obviously also, he believes, that each claim—no matter how groundless—is entitled to be judicially considered so every person may have his day in court. That this judicial approach requires much time in a complicated case such as this is no excuse for summarily denying claims without consideration of their factual and legal bases.

That the Mandate was clear as to the scope of dismissal intended in Action 5421 is beyond question. That the Court of Appeals now says it meant complete dismissal of that Action instead of dismissal of specified pleadings now clarifies its original statement. But it is beyond dispute that in its initial mandate that Court issued a flat dismissal Order in Action 5678, and merely ordered certain specified pleadings (of the many pleadings then in the 12,000 page printed record before it) dismissed in Action 5421. The only question here is whether the Court of Appeals' own lack of clarity justifies the issuance of the extraordinary writs

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[26] Cited, *supra*, note 1.

herein to correct what it says are mistakes by Judge Hall in interpreting what was said by that Court.

VII. Size of the Record and Complication of Issues Does Not Justify Wiping Out All Claims Herein, Thereby Destroying Accrued Rights of Unrepresented and Unnotified Third Parties and Requiring a New Round of Litigation to Settle Matters Decided by Prior Orders in Cases Now Ordered Dismissed.

The sweeping and unprecedented decision of the Court of Appeals makes this a decision of far reaching consequences not only for the current litigants but for third persons who are not now parties. Seemingly this unique action is based chiefly upon the fact that this litigation has grown to the point that the Court of Appeals in exasperation wrote in its opinion:

> "With new cases being rapidly filed in which all of the old issues of 1946 are revived and asserted to be now open (or reported) for adjudication, it is certain that the problems now present will multiply until they outrun the capacity of the courts to bring any sort of order out of the chaos and confusion thus being engendered. At the present time the bulk of the records makes it utterly impossible to adequately describe the scope of, and the demands voiced in pleadings in the many actions now in the files of this and the lower court. As a matter of fact it is almost impossible to locate certain motions, orders or pleadings in the vast array of records in this litigation. In truth and in fact it has absorbed unto itself the peculiar expanding characteristics of a Banyan tree. In argument of the petition, counsel for Respondent litigants frankly characterized it as 'already fantastic,' and we have pointed up in our opinions

that its unique and unprecedented pattern is without a counterpart in the books. No reported case or controversy has been called to our attention which even remotely resembles it. . . .

"It is our considered judgment that it would be impossible to find in the books a more unique, confusing and extraordinary pattern of litigation or one more shot through and through with 'exceptional circumstances.' Counsel for Respondent litigants was modestly restrained when he characterized the present record as 'fantastic.' The cold fact is that its astounding proliferations have finally created a record of overwhelming and unmanageable size.[27]

Far from justifying the drastic action herein it is respectfully submitted that this situation requires a respecting of the appellate procedures set forth in the United States Code. Then each appeal on each issue, or on each claim, can receive the consideration it deserves. The fact that claims are complicated does not justify summary rejection without consideration of the facts alleged in the complaints.

Here the Court of Appeals granted in part and denied in part the relief requested by the Respondents, obviously basing its views upon its shocked reaction to the unique situation in this case. The relief granted is a flat holding that Petitioners, who have for ten years tried to secure a judgment on the merits of their claims, may never have that judgment. The Court of Appeals holds that its decisions based upon the technicality of failure to exhaust administrative remedies bars Petitioners forever from asserting their claims growing out of Respondents' seizure of their property and assets. Such denial of a judicial hearing upon

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[27] *Federal Home Loan Bank of San Francisco, et al.* v. *Honorable Peirson M. Hall et al.*, Opinion No. 14,378 (C.A. 9, 1955), p. 30-31, f.n. 8.

a governmental seizure does not square with due process of law.[28]

While not ordering the *Foreclosure* action dismissed (or remanded to State Court), defense of that case is an exercise in futility if Petitioners are precluded from asserting the defenses or claims prohibited by the Court of Appeals. In effect Respondents are allowed to maintain *Foreclosure* Action 13,979, but Petitioners are prohibited from defending against Respondents claims therein. Surely such a situation is unique in judicial annals.

Obviously, the Court of Appeals has sought to wipe out this litigation completely. As laudable as that objective may be, it is submitted that this summary wiping out of the hundreds of orders made in this litigation, by a dismissal of Actions 5678 and 5421, will bring an unprecedented flood of litigation far exceeding that herein to date. The helpless and innocent bystanders—home owners and home buyers of approximately 480 parcels of land who had executed trust deeds as security for loans [29] and were so unfortunate as to be affected by this litigation, who intervened in Action 5421, and who have paid $1,820,870.31 [30] into Court—will be grievously affected. The Court of Appeals ordered Action 5421 dismissed within ten days and this the District

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[28] While this Court has held, in connection with the governmental seizures, that those whose property is seized may be compelled to await later judicial proceedings upon the legality of such seizure where "only property rights are concerned" it also has held there must be at "some stage an opportunity for a hearing and a judicial determination." *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599.

[29] See 117 F. Supp. 259 at 274-276.

[30] *Ibid.* p. 288 places the amount then at $1,641,040.46. There is also some $5,000,000 which was paid directly to the Long Beach Association by home owners upon deeds of trust in reliance upon the orders quieting title in Action 5421. The Court of Appeals order wiping that Action out completely clouds the titles of these home owners. See Appx. II to "Return of Real Parties in Interest" in the Court of Appeals for a list of the amount of each such deed of trust and its then status.

Court so ordered. By carrying out the Court of Appeals directions herein in Action 5421 Judge Hall vacated final orders affecting the legal rights and property of these persons who are not now parties to the current proceedings, without notice to such persons, thereby presenting a serious question of whether such persons have been accorded due process of law. Part of the $1,820,870.31 was ordered returned to Respondents herein by the Court of Appeals, i. e., $994,813.44.[31] This money consists of money paid by home owner borrowers, principal and interest, penalties and impounds, reconveyance fees and Federal Housing Administration bonuses. Presumably these home owners must now seek some other legal means to repay their notes, mortgages and other claims all over again and clear the titles to their homes. What they thought was clear title under orders in Action No. 5421 is wiped out.

It seems reasonable that these affected persons must be notified of what has happened so they can take appropriate legal action to protect themselves. But who is to notify them and how? It is submitted that before Action 5421 was completely wiped out, the District Court should have been permitted to notify these affected persons. The task of unwinding this effect of the drastic action of the Court of Appeals is a most serious and difficult matter.

Surely, the substitution of this extraordindary and drastic remedy for the simple appeals from the two District Court orders with which the Court of Appeals disagrees is a cure much worse than the evil the Court of Appeals seeks to eliminate. If the Court of Appeals writs and the District Court orders based thereon could be amended to allow unappealed or final orders and judgments to stand, this

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[31] See p. 65 of Court of Appeals opinion cited, *supra*, note 27 setting forth the receipt Respondents must sign.

would solve a part of this problem insofar as third persons are concerned.

VIII. The District Court Had a Judicial Duty to Perform And Is Not Subject to Mandamus for Performing It.

The Respondents seem to have believed that upon their offering of the Mandate for filing, Judge Hall should have dropped all his other work and immediately signed the order they proposed. Surely such is not the required mode of judicial action in our Country. This Court so stated long ago when mandamus was sought against the Court of Claims to compel such speedy unjudicial action. See *In re Hall*, 167 U. S. 38 at 42, where the Court said:

> "In this case the judgment was, in form at least, absolutely reversed and the case remanded to the Court of Claims for further proceedings not inconsistent with the opinion of this court. Confessedly, further proceedings by virtue of the mandate and under the direction of the Court of Claims were necessary to be taken before any judgment could be entered in such court and thereafter enforced, and *before any proceedings were taken by way of entry of any judgment Congress interfered by repealing the statute.*[32] When the mandate was filed in the Court of Claims and the motion made for judgment, that court was engaged in the regular trial of causes; it was not a motion day according to the practice of the court, and the court received the mandate and heard the request, and took the same under advisement for decision thereafter. The court was not bound, upon the simple presentation of the mandate and the statement of counsel, even if there

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[32] *Cf.* here, repeal of pre-existing law by adoption of the Housing Act of 1954. See, *supra*, note 21.

> were no opposition on the part of the attorney for the District of Columbia, to immediately drop all other business and grant the motion; it had the right, and it was its duty in the due and orderly progress of its work, to take the motion into consideration if it thought it necessary, so that it might examine the opinion and come to an intelligent conclusion as to what action was required of it for the purpose of complying with the terms of the mandate." (Italics supplied.)

In the instant case Judge Hall performed his duty in "due and orderly progress" of his work, took the matter of the mandate and its undisputed and disputed provisions into consideration and came to an intelligent conclusion as to the action required to comply with its terms. The record above recited makes this crystal clear.

And having so worded its Mandate as to create disputes as to its meaning, the Court of Appeals thereby cast a duty upon the District Court which that Court is not to be criticized for performing. In *Ex Parte The Union Steamboat Company*, 178 U. S. 317 at 319 the Court said:

> "The inferior court is justified in considering and deciding any question left open by the Mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court. . . ."

The Court there rejected the use of a writ of mandamus as a substitute for an appeal.

IX. Conclusion

The facts and the law applicable thereto demonstrate that the issuance of an extraordinary writ of Mandamus is unjustified in this Case. The Petition for a writ of Certiorari should be granted.

Respectfully submitted

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Charles S. Rhyne,
Eugene F. Mullin, Jr.,
J. Parker Connor,
Attorneys for Petitioner Peirson M. Hall, Judge, United States District Court for the Southern District of California.

February 15, 1956

APPENDIX A

Work of Judge Hall for Year Following Receipt of Mandate

Since the Petition for the Writ of Mandamus and the decision of the Court of Appeals herein rests upon what Judge Hall did, or did not do, for approximately one year following receipt of this mandate, it is believed that an accounting of Judge Hall's work during that period is required. The records of Judge Hall's Court for the period of approximately one year after the issuance of the disputed mandate show as follows:

A. *In other cases:*

1. He heard more than 1,400 separate calendared matters, including both criminal and civil trials.

2. He presided in May and June, 1953, over the trial of a water rights case in Fresno, California.[1]

3. He was presiding Judge of the criminal calendar of his Court in July, August and September, 1953, and again in January, February and March, 1954—a duty which takes all the time of the Judge on this assignment. Criminal matters are required to be given a preference over all other matters,[2] such as the instant case.

B. *In the instant case:*

1. On June 22, 24, 1953, he held hearings on the requirements of the Mandate and on June 24 ordered the Mandate spread upon the records of the Court.

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[1] See 117 F. Supp. 266-268, for the fact that this water rights case was entitled to precedence over the instant litigation.

[2] Rule 50, *Federal Rules of Criminal Procedure.*

2. He directed Respondents to file by July 17, 1953, proposed orders to carry out the Mandate.

3. He directed oppositions and counter-proposals to be filed by August 3, 1953.

4. On September 21, 1953, he entered an order vacating the preliminary injunction pursuant to paragraph 4 of the Mandate.

5. On October 12, 1953—the earliest possible date—he began eight court days of hearings upon the twenty-nine motions and proposed orders relating to the Mandate, and a related foreclosure suit, Action No. 13979[3] —which had been filed by Respondents in State Court to collect on notes, signed by Conservator Ammann for the Long Beach Association, and to foreclose on claimed security therefor.

6. He requested the parties to make the audit required to carry out part 3 of the Mandate for the return of notes, bonds and cash to Respondents.

7. He prepared a memorandum opinion upon the points raised upon said motions and proposed orders so as to conform to said Mandate. To do this, Judge Hall had to study the pleadings, which are lengthy and complex (one of them covers 250 pages not counting exhibits), the opinions of the Court of Appeals which cover 118 printed pages, the record on appeal in Action 5421 of 12,000 printed pages, the records of the District Court which occupy several filing cabinets of four

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[3] On November 13, 1952, in staying all proceedings in consolidated cases 5421-5678 pending appeals from orders therein, the Court of Appeals had stated it was not staying proceedings in this case saying: "said District Court is hereby permitted to entertain and determine the cause designated as No. 13,979 filed in said District Court." By an order dated March 25, 1952 the Court of Appeals had authorized the filing of this Action and stayed its injunction insofar as it enjoined the Long Beach association "from appearing in, answering, defending and participating in such actions."

drawers each, and the hundreds of orders which have been made covering numerous parties and subjects besides the main litigants, all of which had to be examined due to the Mandate's language specifying what was to be dismissed and what was to be done.

8. On November 30, 1953 he filed a comprehensive memorandum opinion[4] covering all matters involved in the motions and proposed orders, except the amount and allocation of costs and the Special Masters' fees upon which further hearings were ordered held.

9. On December 11, 1953, orders were filed dismissing the pleadings in Action 5421 which had been specifically enumerated for dismissal in the Mandate.

10. On December 11, 1953, he entered an order for the return to Respondents, on December 22, 1953, of the notes and collateral specified in paragraph 3 of the Mandate.[4a]

11. On December 21, 1953, he ordered a stay of such order for return of the notes and collateral.

12. On January 14, 1954, he held hearings on motions in the foreclosure suit (Action 13,979) and motions for substitution of parties defendant.

13. On January 22, 1954, he signed an order substituting as parties defendant certain present and former members of the Home Loan Bank Board.

14. On January 27 and 28, 1954—the earliest possible date—he held hearings on the amount and allocation of the Special Master's fees. Said Special Master had during inspection and discovery proceedings in the consolidated cases 5421-5678 marked 44,000 documents, expended $10,000 for clerical help, court reporters, photostating, microfilming and the like, and had been

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[4] 117 F. Supp. 259. See Text pp. 34-98, Appendix A to combined Certiorari Petition of *Mallonee* et al. herein.

[4a] c.f. pages 12-15, compliance with mandate.

allowed $61,000 as interim fees. The Mandate's requirement of dismissal of Action 5678 at the costs of plaintiffs required a separation and allocation of these Special Master costs [5] from costs incurred and allocated to Action 5421 which the Court of Appeals had not ordered dismissed.

15. On June 10, 1954, he filed an opinion deciding all matters respecting costs and Special Master fees and allowances.[6]

16. On September 16, 1954, he filed an opinion [7] on return of the notes and collateral and granting summary judgment to quiet titles in foreclosure Action 13,979.

17. On July 22, 1954, he entered a judgment dismissing Action 5678 and fixed costs therein at $15,675.87 —after first severing the consolidated Actions 5421 and 5678.

18. On July 23, 1954, he entered judgment in accordance with paragraph 2 of the Mandate for costs against the Long Beach Association for $95,608.31 in accordance with findings of fact and conclusions of law made in that Action, and stayed execution of such judgment until further order of the Court.

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[5] Rule 53(a) of the *Federal Rules of Civil Procedure* requires that the costs be assessed before Action 5678 was dismissed.

[6] 122 F. Supp. 401. The Respondents herein knew, as their Petition of June 4, 1954 shows, that Judge Hall had this matter under consideration and was preparing this opinion.

[7] 122 F. Supp. 960. Similarly, as stated, *ibid*, Respondents knew this opinion was being written when they filed their Petition on June 4, 1954.